

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 28, 2007 Session

JOHN C. KERSEY, SR. v. TRUMAN JONES, ET AL.

**Appeal from the Chancery Court for Rutherford County
No. 05-1138CV Donald P. Harris, Judge**

No. M2006-01321-COA-R3-CV - Filed on July 23, 2007

In this Public Records Act case, Mr. Kersey attempted to view the personnel file of a deputy at the Rutherford County Sheriff's Department by presenting a written request to one of three custodians of the department's records. The custodian did not allow Mr. Kersey to inspect the file, saying it was the policy of the Sheriff's Department for another employee, who was unavailable, to review any records requests. Mr. Kersey left the Sheriff's Department without having been allowed to view the file, nor with any indication that he would ever be permitted to do so. One week later, Mr. Kersey filed suit against the sheriff and the custodian who had refused him access to the personnel records he requested. The trial court granted summary judgment to the Defendants. On appeal, we find that the trial court erred in granting summary judgment, as there are material questions of fact regarding whether the Defendants violated the Public Records Act. Therefore, we vacate and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

John C. Kersey, Sr., Murfreesboro, Tennessee, *pro se* Appellant.

D. Randall Mantooth, Nashville, Tennessee, for the Appellees, Truman Jones and Regina Nelson.

OPINION

I. Background

We review the facts of this case in a light most favorable to Mr. Kersey, the nonmoving party, as we are required to do when considering a trial court's grant of summary judgment. *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). Mr. Kersey visited the Rutherford County

Sheriff's Department at approximately 11:30 a.m. on March 21, 2005. His purpose was to view the personnel file of Deputy Jonathan Stephens, pursuant to the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503, *et seq.* Mr. Kersey first spoke with a clerk at the Sheriff's Department, stating that he wished to view Deputy Stephens' file and asking to see the person in charge of personnel files. The clerk relayed Mr. Kersey's request to Captain Frost, who came to the reception area to speak with Mr. Kersey. Mr. Kersey presented Captain Frost with a written request to view the deputy's personnel file, at which time Captain Frost said that he would present the document to his supervisor.¹

A couple of minutes later, Regina Nelson, who serves as administrative assistant to Rutherford County Sheriff Truman Jones, came out to speak with Mr. Kersey. Ms. Nelson stated that she was one of three individuals at the Sheriff's Department who had control over the records Mr. Kersey wished to see. Despite the fact that she was a custodian of records for the Sheriff's Department, Ms. Nelson did not allow Mr. Kersey to see Deputy Stephens' personnel file. Ms. Nelson said that the Sheriff's Department's policy required that a records request be reviewed by a designated member of the department. Ms. Nelson did not identify the person who was allegedly assigned this task, but she did state that the person was unavailable at the time of Mr. Kersey's visit. Furthermore, Ms. Nelson indicated that Mr. Kersey could discuss his request with Sheriff Jones; however, she told Mr. Kersey that the sheriff was at lunch and would be back "in like an hour or two or something." Mr. Kersey left the Sheriff's Department without having been allowed to view Deputy Stephens' personnel file.

One week after this incident, Mr. Kersey filed a complaint in Rutherford County Circuit Court² against Ms. Nelson and Sheriff Jones in their official capacities, seeking, *inter alia*, access to Deputy Stephens' personnel file and a permanent injunction prohibiting Sheriff Jones from denying access to public records in the future. The Defendants filed a motion to dismiss, asserting that they were not proper parties to an open records lawsuit. The trial court denied the motion to dismiss. The Defendants then filed a motion for summary judgment, which the trial court granted. Mr. Kersey appeals.

II. Issue Presented

The issue presented is whether the trial court erred in granting summary judgment to the Defendants.

¹In conformance with the Public Records Act, Mr. Kersey included the following information in his written request to view the personnel file: name, home address, business telephone number, driver's license number, and affirmation that Mr. Kersey is a citizen of the United States and Tennessee. According to state law, anyone who wishes to inspect the personnel file of a law enforcement officer must provide the following information before inspecting the records: "name, address, business telephone number, home telephone number, driver license number or other appropriate identification." *See* Tenn. Code Ann. § 10-7-503(c)(2).

²This case was later transferred to Rutherford County Chancery Court, as circuit court does not have jurisdiction over Public Records Act cases. *See* Tenn. Code Ann. § 10-7-505(b).

III. Standard of Review

Summary judgment is appropriate only when the moving party demonstrates that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” TENN. R. CIV. P. 56.04. When reviewing a motion for summary judgment, this Court is required to view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party’s favor. See ***Robinson v. Omer***, 952 S.W.2d at 426, ***Byrd v. Hall***, 847 S.W.2d 208, 210-11 (Tenn. 1993). The burden of proof rests with the moving party, who must establish that its motion satisfies these requirements. ***Staples v. CBL & Associates, Inc.***, 15 S.W.3d 83, 88 (Tenn. 2000). If the moving party makes a properly supported motion, the burden shifts to the nonmoving party to establish the existence of disputed material facts. *Id.* (citing ***Byrd v. Hall***, 847 S.W.2d at 215). If, however, the moving party fails to make a properly supported motion, “the non-moving party’s burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail.” ***Staples v. CBL & Associates, Inc.***, 15 S.W.3d at 88.

The standards governing the assessment of evidence in the summary judgment context are well established. Trial courts are obligated to consider pleadings, depositions, answers to interrogatories, admissions, and affidavits, to the extent that these are part of the record, in determining whether summary judgment should be granted. See ***AmSouth Bank v. Soltis***, No. E2005-00452-COA-R3-CV, 2005 WL 3601460 at *2 (Tenn. Ct. App. E.S., filed Dec. 29, 2005); TENN. R. CIV. P. 56.04. Summary judgment is appropriate only when the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. See ***McCall v. Wilder***, 913 S.W.2d 150, 153 (Tenn. 1995); ***Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995).

Because a trial court’s decision to grant a motion for summary judgment is solely a matter of law, it is not entitled to a presumption of correctness. See ***Staples v. CBL & Associates, Inc.***, 15 S.W.3d at 88 ; ***Carvell v. Bottoms***, 900 S.W.2d at 26. Consequently, our task is to review the record to determine if the requirements of Rule 56.04 of the Tennessee Rules of Civil Procedure have been met. ***Staples v. CBL & Associates, Inc.***, 15 S.W.3d at 88.

IV. Analysis

Mr. Kersey filed this lawsuit pursuant to the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-503, *et seq.*, which provides in pertinent part:

- (a) Except as provided in § 10-7-504(f), all state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation, except any public documents authorized to be destroyed by the county public records commission in accordance with § 10-7-404, shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such

right of inspection to any citizen, unless otherwise provided by state law.

* * *

(c)(1) Except as provided in § 10-7-504(g), all law enforcement personnel records shall be open for inspection as provided in subsection (a); however, whenever the personnel records of a law enforcement officer are inspected as provided in subsection (a), the custodian shall make a record of such inspection and provide notice, within three (3) days from the date of inspection, to the officer whose records have been inspected

Tenn. Code Ann. § 10-7-503. Although state, county, and municipal records are generally open to the public, the General Assembly has established exceptions for certain information which is to remain confidential. *See* Tenn. Code Ann. § 10-7-504. Of particular importance in this case is the following subsection, which provides that:

(f)(1) The following records or information of any state, county, municipal or other public employee in the possession of a governmental entity in its capacity as an employer shall be treated as confidential and shall not be open for inspection by members of the public: unpublished telephone numbers; bank account information; social security number; driver license information except where driving or operating a vehicle is part of the employee's job description or job duties or incidental to the performance of the employee's job; and the same information of immediate family members or household members.

(2) Information made confidential by this subsection (f) shall be redacted wherever possible and nothing in this subsection (f) shall be used to limit or deny access to otherwise public information because a file, a document, or data file contains confidential information.

Tenn. Code Ann. § 10-7-504(f).³ In addition to specifying which records shall be open to the public, the Public Records Act also provides citizens with the right to file a lawsuit in order to obtain public records to which they have been denied access. Tenn. Code Ann. § 10-7-505. In such instances, "[t]he burden of proof for justification of nondisclosure of records sought shall be upon the official and/or designee of the official of those records and the justification for the nondisclosure must be shown by a preponderance of the evidence." Tenn. Code Ann. § 10-7-505(c). Furthermore, courts

³Tennessee law also provides that information regarding undercover officers may be segregated from the personnel files of other law enforcement officers and be treated as confidential. *See* Tenn. Code Ann. § 10-7-504(g). However, the Defendants have not asserted that Deputy Stephens is an undercover officer, and neither party claims that this subsection is relevant to the case at bar.

must broadly construe the Public Records Act “so as to give the fullest possible public access to public records.” Tenn. Code Ann. § 10-7-505(d).

In the case at bar, the Defendants do not dispute that the personnel record of Deputy Stephens was a public record that Mr. Kersey was entitled to review under the authority of the Public Records Act. The apparent dispute stems from whether Mr. Kersey was unlawfully denied the record that he sought on March 21, 2005, or whether the Sheriff’s Department’s policy, which provided for review of the personnel record by another employee before being released to a citizen, was permissible according to the requirements set forth by the General Assembly, and if so, whether that policy was followed correctly in this situation.

Mr. Kersey described his conversation with Ms. Nelson as follows:

As I recall Regina Nelson informed me that the sheriff was not there, then the next thing she informed me – and she never gave the name, the person you need to see is not here, the person who handles those requests and who reviews those requests, and I remember that word, reviews those requests, and I think she said approves those requests, is not here, she never did identify who that person was.

I then said the statute says I’m entitled to them, don’t give me excuses, and she then began to give me excuses and at some point in time I said, look, are you going to furnish me the file or not, and one of the excuses was you can come back, and I don’t recall her saying whether in a couple of hours, I do remember her saying that Truman Jones would be back in like an hour or two or something, and then something was said about Mr. Farmer

* * *

I remember asking Mrs. Nelson or Ms. Nelson specifically do you have authority over the personnel files because the statute says those in charge of the files shall not refuse to produce them.

Ms. Nelson indicated she did have authority over the personnel files so I felt like that I had met my requirements under the statute and I placed her in a position of either giving me the file or denying me the file.

She denied me the file and then I filed suit.

In her affidavit, Ms. Nelson confirmed that she refused to allow Mr. Kersey to view Deputy Stephens’ personnel file, stating, “Although I cannot recall every word of our conversation, I told Mr. Kersey words to the effect that we could not release a personnel file until we had followed our procedure to review the request.” In support of their Motion for Summary Judgment, the Defendants

also submitted an affidavit of Col. Edward T. Farmer, which provided in pertinent part:

The Rutherford County Sheriff's Office produces personnel files for review by a resident of the State of Tennessee upon request. Our procedure for allowing such a review is for me to first review a complete copy of the personnel file and redact confidential information pursuant to Tenn. Code Ann. § 10-7-504(f)(2).

The Defendants asserted that the Sheriff's Department was not required to provide Mr. Kersey with immediate access to Deputy Stephens' personnel file because state law mandates redaction of certain confidential information before the file may be released. We agree. Pursuant to the Public Records Act, the Sheriff's Department must redact confidential information from a personnel file before the file may be viewed by a member of the public. *See* Tenn. Code Ann. § 10-7-504(f). In *Eldridge v. Putnam County*, 86 S.W.3d 572 (Tenn. Ct. App. 2001), we affirmed the trial court's ruling that telephone records of a Drug Task Force were public records and that the defendant violated state law by denying the plaintiff's request to view the documents. *Id.* at 574. Although we agreed that the defendant had not established the existence of confidential information within the telephone records, on remand, we permitted the defendant to redact any confidential information pursuant to Tenn. Code Ann. § 10-7-504(f) before allowing the plaintiff to examine the records, subject to review by the trial court. *Id.*; *see also Schneider v. City of Jackson*, -- S.W.3d --, 2007 WL 1514957 (Tenn. 2007) (allowing redaction of confidential information from public records but directing that the "entire process should be concluded as expeditiously as possible"). It is to be expected that a personnel file would include information that is defined as "confidential information" according to the Public Records Act, such as home telephone numbers, social security numbers, and so forth. *See* Tenn. Code Ann. § 10-7-504(f). Thus, the Rutherford County Sheriff's Department, acting through its agents, would be entitled – indeed, even required – to redact such confidential information from Deputy Stephens' personnel file before allowing Mr. Kersey to view the file. Depending on the size of the personnel file, copying the file and redacting confidential information from it could take anywhere from a few minutes to several hours. We find, therefore, that Mr. Kersey was not entitled to immediate access to Deputy Stephens' personnel file.

However, this does not end our inquiry. Even though the Sheriff's Department was entitled to delay production of the personnel file by the amount of time it would take to redact confidential information from the file, the Department may not "limit or deny access to otherwise public information because a file, a document, or data file contains confidential information." Tenn. Code Ann. § 10-7-504(f)(2). In keeping with this statute, it is logical to conclude that if a governmental entity or an agent thereof is unable to immediately satisfy a citizen's request for access to a public record pursuant to the Public Records Act because confidential information must be redacted from the document(s), then it should, at the time of the request, inform the citizen that access to the record will be allowed and also explain the reason for any delay in production of the document. The entity or its agent should also provide a time when the citizen will be able to view the record or may, instead, collect contact information from the citizen and notify him or her when the redaction is complete.

We find there is a material question of fact as to whether the Defendants unlawfully denied access to Mr. Kersey under the facts in this case. Nothing in the record indicates that Mr. Kersey was told that he would be provided with an opportunity to view Deputy Stephens' file after Col. Farmer redacted confidential information from the file. Instead, Ms. Nelson told Mr. Kersey that another employee, whom she did not name, would have to "review" Mr. Kersey's request. Mr. Kersey stated that he thought his request would have to be approved before he could see the personnel file he sought. Thus, there is no indication that the Sheriff's Department informed Mr. Kersey that it would allow access to the Deputy Stephens' record, nor did it provide a time when Mr. Kersey might return to view the personnel file. As a result, there is a material question of fact regarding whether the Defendants violated the Public Records Act by denying Mr. Kersey's request to view Deputy Stephens' personnel file. Therefore, we find that summary judgment was inappropriate in this case.

On appeal, the Defendants have presented several arguments as to why the trial court correctly granted summary judgment to them and dismissed Mr. Kersey's complaint. Although we have addressed many of these points already in the discussion above, we will consider the remaining arguments below, so as to avoid any confusion on remand.

The Defendants, the sheriff of Rutherford County and his administrative assistant, argue that they were improper parties to this lawsuit, and that Mr. Kersey should have sued Rutherford County instead. The trial court disagreed with this assertion, as do we. The Public Records Act states that:

(a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503, and whose request has been in whole or in part denied *by the official and/or designee of the official or through any act or regulation of any official or designee of any official*, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

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(c) The burden of proof for justification of nondisclosure of records sought shall be upon *the official and/or designee of the official of those records* and the justification for the nondisclosure must be shown by a preponderance of the evidence.

Tenn. Code Ann. § 10-7-505 (emphasis added). Clearly the General Assembly contemplated that custodians of records who failed to comply with the Public Records Act would be named as defendants in the event of a lawsuit. In fact, the Act even states that "the official and/or designee of the official of [the] records" would bear the burden of proof for establishing why the records in question were exempt from disclosure. As we are unaware of any law, case, or rule which purports to place the burden of proof upon a person or entity who is not a party to the lawsuit, we believe that the Public Records Act permits claims against custodians of records, such as the Defendants in this case. We find support for this proposition in the number of cases filed under the Public Records Act

against individuals in their official capacities, rather than against a governmental entity. *See, e.g., Moody v. Hutchison*, 159 S.W.3d 15 (Tenn. Ct. App. 2004) (sole defendant was sheriff); *Jones v. Crumley*, No. E2003-01598-COA-R3-CV, 2004 WL 2086330 (Tenn. Ct. App. E.S., filed Sept. 20, 2004) (sole defendant was district attorney general); *Contemporary Media, Inc. v. Gillless*, No. W2000-02774-COA-R3-CV, 2002 WL 1284272 (Tenn. Ct. App. W.S., filed June 3, 2002) (sole defendant was sheriff); *Waller v. Bryan*, 16 S.W.3d 770 (Tenn. Ct. App. 1999) (defendants were custodians of records); *Quillen v. Crockett*, No. 01AO1-9412-CV-00564, 1995 WL 273665 (Tenn. Ct. App. M.S., filed May 10, 1995) (sole defendant was district attorney, pro tem). Therefore, we find that Sheriff Jones and his assistant, Ms. Kersey, who was also a custodian of records for the Rutherford County Sheriff's Department, were proper parties to this lawsuit.⁴

The Defendants assert that Mr. Kersey's claim was properly dismissed because he abandoned his request by leaving the Sheriff's Department after Ms. Nelson did not allow him to see Deputy Stephens' personnel file. We find this assertion to be without merit. Although Mr. Kersey was not entitled to see the file immediately because of the necessity of redacting confidential information from the record, state law does not require that he sit at the Sheriff's Department indefinitely or make repeated attempts to inspect the records in order to maintain a claim under the Public Records Act.

The Defendants also maintain that Mr. Kersey's lawsuit is moot because he was provided with a copy of Deputy Stephens' personnel file (with confidential information redacted) on June 6, 2005, through the Defendants' attorney. We disagree. Mr. Kersey filed his lawsuit on March 28, and the record did not arrive until more than two and a half months later. We have serious doubts about the necessity of such a long delay in granting access to public records. There is also a question of fact as to whether the records would have been provided if Mr. Kersey had not filed this action. Perhaps most importantly, if a governmental entity or its agents could escape liability under the Public Records Act simply by providing a copy of the requested documents *after* a lawsuit has been filed, then the Act would be pointless. We are certain that the legislature did not intend this result.

V. Conclusion

After careful review, we hold that the trial court erred by granting summary judgment to the Defendants because a genuine issue of material fact exists as to whether the Defendants violated the Public Records Act. Therefore, we vacate and remand this case to the trial court for a trial on the merits. Costs of appeal are taxed against the Appellees, Truman Jones and Regina Nelson.

SHARON G. LEE, JUDGE

⁴By making this finding, we express no opinion as to the merit of Mr. Kersey's claims against either defendant.